

## **Minutes of the Public Works Committee - July 22, 2003**

The meeting was called to order at 8:15 a.m. by Chair Manke. Supervisor Swan led the committee in the Pledge of Allegiance.

**Present:** Chair Richard Manke, County Board Supervisors James Behrend, Hank Carlson, Karl Nilson, Rodell Singert, David Swan; **Absent:** Genia Bruce

**Staff Present:** County Board Chief of Staff Lee Esler, Legislative Policy Advisor Mark Mader, Legis. Associate Sandra Meisenheimer

**Also Present:** Corporation Counsel Tom Farley, Public Works Building Projects Mgr. Dennis Cerreta, Sid Samuels (Construction Mgr., Project Mgr., and Vice-President) and Dan Mueller (Asst. Project Mgr.) of Adolfson & Peterson Construction, Sheriff Correctional Captain Meg Schnabl, Chairman Jim Dwyer, John Westphal (President) and Dan Zurawik (Branch Manager) of Westphal & Company, Inc., and John Arkowski (Project Superintendent) of Venture Electrical Contractors, Inc.

### **Consider Request to Withdraw Bid Qualification for Electrical Work on the Jail Capital Project and Consider Bid Protest on the Electrical Work for the Jail Project**

Farley gave an update on what has transpired thus far concerning this issue. Handouts were distributed. He referred to the second page of a letter dated June 26, 2003 that was submitted with Westphal's bid, but in a separate envelope, which said they were carrying no cost for the relocation fee of the 25K volt service. The Power Company was not able to provide them with a price at the time of the bid. Farley stated the Public Works Committee at their last meeting was advised that this was the type of document which made the bid non-responsive. In other words, it was interpreted that they (Westphal) were indicating to the county that they did not have any cost in their bid for this requirement, and it was the construction manager and the staff's interpretation of this document that they would be asking for a change order and add to the contract when they received that cost.

Farley stated the next page, the third document, is a letter from Westphal's attorney indicating that they didn't think that should make their bid non-responsive, and they were merely trying to advise of costs that weren't in the bid. Farley also advised that there were e-mails between the construction manager and Westphal prior to the bid. The key e-mail is a response to Westphal's request that appears at the top of the fourth page where the construction manager advises Westphal: "I understand your concern and apologize for the situation." (Farley said the concern was the utility not providing them with a cost to do the job that they would be responsible for.) "Looking back, an allowance or NIC would have been a good idea for this item. If A&P and the Owner feel it necessary to discuss the scope with low bidders, we will do that. With that said, there will be no opportunity to add money for items that were missed or for bidders to make clarifications once the bids have been submitted, unless of course there are bid document errors." Farley said this was related to the bidder prior to his submittal of the bid. He still submitted a clarification, and it was our understanding and anticipation that this meant he was going to be asking for money later on, which meant that all the bids were not the same.

Farley said the last document is the first page of the first packet distributed, which is Westphal's request to withdraw their clarification. They indicate that the purpose was to explain the situation

so there are no surprises to the owner. It was difficult to estimate what the cost would be. They do indicate that they will absorb those costs if they are allowed to withdraw their clarification and are awarded the contract. Farley stated he is recommending that the treatment of the qualification letter as rendering the bid non-responsive was reasonable and especially in light of the e-mails where they were asked not to do that would also render the bids as being unequal.

Chair Manke allowed Dan Zurawik of Westphal & Co. to speak. Zurawik stated they are here today for 3 reasons: 1) to consider their request to withdraw their certification, 2) to reconsider the award to the second contractor, and 3) to award the project to Westphal. They feel they should not be penalized for following the instruction of bidders and supplemental instructions to bidders. They did not modify the bid form in any way and their clarification was submitted for Section 153.e. Their clarification simply stated that they were carrying no cost for the relocation fee because it was not available at the time of bid. They did not state that they had recorded a change order or incur any added costs due to the fee. They felt since paragraph 153.e was inserted into the specification that it was there for a reason in order to make sure the project was bid properly and possibly to avoid any surprises that could affect the project which is already on a tight budget. They felt they were doing the right thing in alerting the county of a potential issue. In the 13 years he has been doing this, he has never modified or clarified a public bid. In fact the only reason he did it here was because of that paragraph in the supplementary instruction to bidders. It clearly gives that opportunity for a clarification. It is their position it should not be labeled non-responsive and should not have been rejected; therefore, Westphal & Co. should be awarded the project. Also, regarding the e-mail that Tom Farley mentioned, it is his understanding that any non-formal communication is non-binding and should not overrule the specifications.

Farley asked if the utility costs were to come in at \$20,000, \$30,000 or \$40,000, would you have been asking for additional monies? John Westphal replied no sir. Farley asked why did you tell us about it then? Comments by John Westphal (President of Westphal & Co.) were allowed by Chair Manke. Westphal said the reason is in the instructions to bidders. The first sentence says when the job is bid to not alter the bid form in any way, i.e. no additions, deletions or qualifications, because then the bid form will be non-responsive. That is standard on any public bid, and they are very familiar with that. The second sentence says any clarifications or other comments must be submitted in a separate, clearly marked sealed envelope. So typically what happens on projects like this is that there is an allowance put forth by the owner that we have to include in our bid – an allowance saying please include \$35,000 for utility fees. This allows for budgeting to bid for what the utility fees would be, and its unusual that that kind of allowance isn't put in the instructions for the bidders. What we (Westphal) were trying to do was to alert you that there should be some kind of an allowance as in the e-mails prior to and as a follow up to the e-mails that they were trying to continue the communication to have you (county) aware that this issue is out there. This whole issue rests on our putting that letter in a separate envelope as a communication means but clearly was per your instructions. However, it doesn't say that if we do this, you're going to throw our bid out. You said don't alter the bid form which we didn't do. You said put comments in a separate envelope which we did. By following your instructions, you're throwing out our bid as non-responsive. Westphal stated this is unfair and we are asking that our letter be withdrawn. If this is a big deal, let our their bid form stand like it always has. That is what we are requesting.

Samuels said there are a couple things he would like to point out which are in the work sequence and bid categories in Section 01014 where they specifically asked for a clarification statement,

because they knew there was going to be a charge for these location services. Under 16A-Electrical, it specifically requests to coordinate all work related to relocate the 25K volt underground service of local utilities, etc. They knew there was going to be a fee but at bid time did not know exactly how much it was going to be but did want it included in the bid category. Samuels said when they reviewed the separate envelope with the clarification statement, it did alert them to the fact that they (Westphal) did not have that portion of the work included that was specifically asked for. When it was excluded, they looked at it as being a non-responsive bid.

Farley stated what should be focused on is when the bids were opened and finding the qualification whether the treating of the qualification as non-responsive was reasonable. This is the committee's purpose here today. A committee discussion continued. Nilson referred to the letter from Bakke Westphal dated June 26, 2003. Nilson stated if he were a layman which he is, and reading "No. 1. We are carrying no cost for the relocation fee of the 25K volt service. The power company was not able to provide us a price by the time of bid", he would infer from that statement that when the price came in, it would be added. Now he understands that it will be absorbed but this doesn't say that.

Esler said he is not an attorney but he was a former college English teacher. He referred to the use of the word "non-responsive" and said it seems to him that it might be responsive if they (Westphal) followed the conditions of the bid specifications. But from the ordinary language of the "qualification" and the correspondence, it seems there would be a cost added which makes Westphal's bid more than \$618 over Venture's. It certainly would cost something well in excess of that to relocate a 25K volt transformer and service.

Cerreta said he has not changed the recommendation but he does sense the frustration. He can only think of it as who has done the opposite. Mader asked what would be the court's stance if it was rebid and what would the impact be on timing? Farley replied that there has to be a reason to rebid such as overbidding, something wrong with the specifications, etc. A bid sets up a binding contract and so the awarded bidder (Venture) is entitled to a contract if everything else is appropriate at this time. It could be rebid if it was in the county's best interests as to budget issues, substantial changes that had to be made or irregularities that suggested fraud and collusion, etc. Farley said he does not think that a rebid is called for in this situation.

**Motion:** Carlson moved, second by Swan, to reaffirm the bid from Venture Electrical Contractors, Inc. that was approved on July 10, 2003. **Motion carried 6 – 0.**

**Motion:** Swan moved, second by Behrend, to adjourn the meeting at 8:45 a.m. Motion carried 6 – 0.

Respectfully submitted,

Genia C. Bruce  
Secretary

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